

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

ERIKA EBERHARDINGER

vs.

BENJAMIN SMITH and
MATTHEW FOSTER

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No. 1:16-CV-02481-CCC
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**BENJAMIN SMITH’S REPLY BRIEF IN SUPPORT OF HIS MOTION
TO STAY THE PROCEEDINGS PENDING APPEAL
TO THE THIRD CIRCUIT**

Defendant Benjamin Smith, by and through his attorneys, William J. Ferren & Associates, hereby submits this brief in response to Plaintiff’s Response to Motion for Stay.

I. PLAINTIFF’S RESPONSE DOES NOT ADDRESS THE PRACTICAL CONSIDERATIONS WARRANTING A STAY OF THIS ACTION UNTIL THE APPELLATE PROCEEDINGS ARE CONCLUDED.

As set forth in Officer’s Smith’s motion for a stay, well-established case law strongly supports a stay of all pretrial matters until the appellate process is concluded. Plaintiff does not cite a single case in her response to support denying Officer Smith’s request for a stay of this action.

Plaintiff’s first reason is that the appeal is improper. However, Officer Smith respectfully submits that is for the Third Circuit to decide. Officer Smith filed the necessary appellate documents, including a concise summary of the case, thus

preserving his appeal. Plaintiff filed her necessary appellate documents raising this argument. In response to the parties' submissions, the Third Circuit did not dismiss the appeal but scheduled a mandatory mediation for January 3, 2018. We fully expect a briefing schedule will be issued by the Third Circuit if the case is not resolved on January 3, 2018.

Plaintiff's second reason is that she is "prejudiced" by the timing of the filing of the motion to stay because she already prepared and filed motions *in limine*. At the outset, it bears noting that the motions *in limine* filed by Plaintiff are extremely brief. In fact, each motion *in limine* consists of one (1) page with a supporting brief ranging from two (2) to three (3) pages, with only the conclusion on the third page. While counsel for Officer Smith would have preferred filing the motion for stay before the motions *in limine* deadline, the timing was not due to lack of good faith. Rather, counsel was (and is) aware that Plaintiff was (and is) aware of the appeal and upcoming mediation, and it was only after Plaintiff's filings were received the morning of December 4, 2018 (ECF notifications establish that Plaintiff's counsel filed the motions *in limine* between 5:51 p.m. and 5:58 p.m. on December 3, 2018 after counsel had left for the day) that it became apparent that a stay was not automatic but had to be requested.

Plaintiff's second reason is simply a red herring and is not a basis to deny the stay. To the contrary, practical considerations dictate a stay and the hardship

and inequity of litigating this case in both the District Court and Third Circuit simultaneously requires a stay. There simply is no prejudice to the Plaintiff.

II. PLAINTIFF’S REQUEST THAT THE COURT BAR OFFICER SMITH FROM FILING MOTIONS IN LIMINE MUST BE DENIED.

Plaintiff’s request that Officer Smith be barred from filing motions *in limine* is gamesmanship at its worst. This is especially true in light of the historical context of this case wherein Plaintiff submitted “side by side” video nearly six (6) months after the close of fact discovery, four (4) months after the deadline for Plaintiff to produce expert reports, four (4) months after Officer Smith filed for summary judgment, and over one (1) year after being provided the original videos from the City.

In making his request, Plaintiff clearly is seeking an unfair tactical advantage not geared towards fair play and substantial justice. To that end, the request should be denied and it is respectfully requested that all deadlines, from motions *in limine* to jury selection and trial be reset after the appeals process has concluded.

III. CONCLUSION

Officer Smith respectfully requests this Honorable Court grant his motion for a stay pending the resolution of his appeal on qualified immunity.

Respectfully submitted,

William J. Ferren & Associates

By: s/Leticia J. Santiago
Leticia J. Santiago, Esquire
10 Sentry Parkway, Suite 301
Blue Bell, PA 19422
Attorney No. PA308519
(215) 274-1724 (telephone)
(215) 274-1735 (facsimile)
Attorney No. PA308519
ljsantia@travelers.com

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	:	
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MATTHEW FOSTER	:	

CERTIFICATE OF SERVICE

I, Leticia J. Santiago, Esquire, hereby certify that on this 5th day of December, 2018, caused a true and correct copy of foregoing Motion to be served upon all counsel of record by electronic filing of same.

WILLIAM J. FERREN & ASSOCIATES

BY: /s/ Leticia J. Santiago, Esquire
Leticia J. Santiago, Esquire
10 Sentry Parkway, Suite 301
Blue Bell, PA 19422
(215) 274-1724
ljsantia@travelers.com

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